

ISSUES RE CONCURRENT JURISDICTION OVER MARITIME WORKERS

WORKERS INJURY LAW & ADVOCACY GROUP

November 5, 2010

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There are three aspects relative to concurrent jurisdiction of state and federal remedies over maritime workers:

- The issue of federal supersession whether states have legislative authority to prescribe employers' liabilities and workers' remedies for maritime workers that are inconsistent with or supplement federal general maritime law or federal statutory remedies;
- State workers' compensation legislation overlapping with the federal Longshore & Harbor Workers' Compensation Act (the "LHWCA"), 33 U.S.C. § 901 *et seq.*; and
- Overlapping jurisdiction and remedies of the LHWCA coverage and federal seamen's remedies for some workers.

My own practice was involved in the first issue for a number of years – state attempts to apply state workers' compensation legislation to seamen – in the context of the long-lasting disputes whether the Alaska Department of Workers' Compensation had jurisdiction over fishermen generally and processors on at-sea factory processors specifically. That work was summarized in an article "Federal Supersession of State Workers' Compensation Acts as Applied to Jones Act Seamen," 8 UNIVERSITY OF SAN FRANCISCO MARITIME LAW JOURNAL 186 (1996). The California Court of Appeals did not see things my way in *CNA Ins. Co. v. Workers' Comp. Appeals Board*, 58 Cal. App. 4th 211, 1998 AMC 534 (1997), which held that there was concurrent jurisdiction between state workers' compensation statutes and federal maritime law with respect to injury to a Jones Act seaman for claims against her employer for injuries that occurred during employment on a ferry that operated between Los Angeles harbor and Catalina Island, thus, the P&I insurers of the vessel on which she was employed could seek contribution from the employer's state workers compensation insurer, but the position I advocated in the University of San Francisco Maritime Law Journal article, that federal seamen's remedies plus the federal substantive law on employers' rights supersede application of state law, was adopted with extensive citation to the *Trident Seafoods Corp. v. Murray*, 2000 AMC 288, 297 (Ak. Sup. Ct. 1999):²

Murray was a Jones Act seaman ... and based upon the same he received a substantial judgment. Based on historical precedent, together with recent opinions from the United States Supreme Court and statutory construction, state workers' compensation statutes cannot apply to the injury of a Jones Act seaman when that injury occurs within the workers's cope of employment as a seaman. This is true, even if the vessel is engaged in local trade Thus, under the [supersession] doctrine, the remedies in this matter remain

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² *Trident* cites to *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 1980 AMC 1930 (1980), for the rule that maritime injuries are exclusively subject to federal law and states may not assert workers' compensation jurisdiction over maritime injuries without infringing on the "overriding federal policy of uniform maritime law."

exclusively federal.

The second seam of potential jurisdictional overlap is between state law and the LHWCA. Since the 1972 Amendments to the LHWCA (which extended LHWCA coverage to land-based employment activities relating to ship building, loading, unloading and repairing ships that occurred on land which adjoined navigable waters, there is concurrent jurisdiction over workers to the upland edge of navigable waters. *Sun Ship, Inc. v. Pennsylvania*. Although it appeared well-settled that the LHWCA exclusively applied to traditional workers on the seaward side of the line, recent decisions have applied state law to claims of workers aboard vessels on navigable waters engaged in employments clearly within LHWCA coverage. That rule of exclusive federal jurisdiction was not followed in *Coppola v. Logistec Connecticut, Inc.*, 2007 AMC 2623 (Ct. 2007), which found concurrent jurisdiction between the LHWCA and the state workers' compensation act on the grounds that although the injury was to a longshoreman working aboard a vessel on state navigable waters, the "employer and employee are locally based". "Locally-based" employers and employees are true of most stevedoring and ship repair operations. Another anomalous decision is *In re Shippers Stevedoring Co.*, 274 S.W.3^d 840 (Tx. App. 2008), which held that where survivors of a harborworker do not assert claims under the LHWCA, there is concurrent jurisdiction between LHWCA remedies and state law for claims arising from the death of the harborworker. As discussed below, I believe *Coppola* is inconsistent with the rule of a majority of jurisdictions that hold that the LHWCA is the exclusive remedy for workers injured on navigable waters while performing traditional maritime functions.

The third issue – overlap between the LHWCA and seamen's remedies – is limited to relatively few potential situations where ship repairers (and, potentially longshore workers) serve as "seamen" in the regular course of their duties, such as was the case in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 1992 AMC 305 (1991).

Defining the Overlapping Borderlines of Concurrent Legislative Jurisdiction.

The issue of concurrent jurisdiction over maritime employment injuries arises from a complicated history. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 61 L.Ed. 1086, 37 S.Ct. 524 (1917), applied the federal interest of promoting a uniform maritime law (see U.S. Const., art. III, §2, which provides that federal courts shall have "judicial power" over "all Cases of admiralty and maritime Jurisdiction"), as superseding states from applying workers' compensation statutes to maritime workers. The plaintiff in *Jensen* was a longshore worker killed in an accident on what was essentially a gangway for trucks used in discharging a vessel. Gangways are considered extensions of the ship, and accidents on them are considered on navigable waters. See, e.g., *The Admiral Peoples*, 295 U.S. 649, 1935 AMC 87 (1935). This line between land and water became known as the "Jensen line." See *Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297 (1983). The effect of *Jensen's* holding was that longshoremen and harbor workers injured on land were allowed to pursue a claim under their states' workers' compensation laws, but longshoremen and harbor workers injured on the seaward side of the *Jensen* line were left without a source of compensation (other than general maritime law negligence remedies which recognized a rule that an employer has no vicarious liability to an employee injured by the negligence of a "fellow servant.") See *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969); *State Industrial Comm'n v. Nordenholt Corp.*, 259 U.S. 263 (1922).

In response to *Jensen's* effect on longshore and harbor workers, Congress, on two occasions,

enacted legislation that would have allowed application of state workers' compensation remedies seaward of the *Jensen* line. See *Wells v. Industrial Comm'n*, 277 Ill. App. 3^d 379 (1995). However, these attempts were struck down as unlawful delegations to the states of congressional power. *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924) (“Without doubt Congress has power to alter, amend, or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers’ liability law or general provisions for compensating injured employees; but it may not be delegated to the several States”); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

The Supreme Court itself narrowed *Jensen's* reach. In *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921), and *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922), the Court held that state remedies are available to workers injured on navigable waters where the worker's employment is “maritime and local in character.” In *Grant Smith-Porter Ship Co.*, the Court explained that the claimant could proceed under state law because neither his general employment nor his duties at the time of his injury had any direct relation to navigation or commerce and, therefore, application of state law could not “materially affect any rules of the sea whose uniformity is essential.” *Western Fuel Co.* found that, in certain circumstances, application of state law “will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations”. Under this line of cases, “if the employment of an injured worker was determined to have no direct relation to navigation or commerce, and the application of local law would not materially affect the uniformity of maritime law, then the employment would be characterized as maritime-but-local, and the State could provide a compensation remedy.” *Wells*. But where an employee was injured on the navigable waters and his employment could not be categorized as “maritime but local,” the employee was left without a compensation remedy. *Perini*, 459 U.S. at 306.

In 1927, Congress passed the LHWCA, establishing a federal compensation system for workers excluded from coverage by *Jensen*. In essence, the LHWCA was a gap-filling measure for those workers to whom *Jensen* made coverage under state law unavailable. Until the 1972 Amendments, the LHWCA covered only employees who were injured on actual navigable waters or any dry dock. See *Nacirema*, 396 U.S. at 219-20. A maritime worker injured on land was not afforded any protection under the LHWCA. *McCoy v. Industrial Comm'n*, 335 Ill. App. 3^d 723 (2002). Because the LHWCA and the state workers' compensation schemes were mutually exclusive, a burden fell on injured maritime workers to determine whether the federal or state compensation scheme applied to a particular factual situation. See *Sun Ship, Inc. v. Pennsylvania*. Injured workers were often compelled to make a “jurisdictional guess” before filing a claim, and if the initial choice was wrong, he potentially could be foreclosed from obtaining relief. *Id.*

This resulted in courts fashioning the “twilight zone” doctrine that allowed injured longshore and harbor workers an election of remedies where the jurisdiction of their injuries was not well defined, where either federal maritime law or state law may be applicable.³ See, e.g., *Sun Ship, Inc.*

³ The “twilight zone” of concurrent jurisdiction was recognized in *Davis v. Dept. of Labor & Industries*, 317 U.S. 249 (1942), to avoid an employee being barred from compensation where he elected to pursue a remedy under either a state workers’ compensation statute or a federal remedy under the LHWCA or seamen’s remedies, where the court or workers’ compensation board determined he had elected the wrong remedy. More-recent decisions recognize a different “maritime but local” rule to hold that not every worker who is injured while employed on navigable waters is precluded from recovery under state workers’ compensation statutes:

v. Pennsylvania; Calbeck v. Travelers Ins. Co., 370 U.S. 114, 1962 AMC 1413 (1962). Most of the cases are restricted to workmen's compensation claims, where the election is between Longshore and Harbor Workers' Compensation Act remedies or remedies under state workers' compensation acts is indistinct because of questions whether a worker's employment was "maritime". With the 1972 Amendments to the LHWCA, as recognized by *Sun Ship*, a maritime worker could seek compensation for injuries as follows:

- Injuries on navigable waters to maritime employees whose employment was not "local" in nature are covered exclusively under the LHWCA.
- "Maritime but local" injuries on navigable waters could be compensated either under the LHWCA or through the state workers' compensation system.
- Injuries to maritime workers occurring on land could be compensated either under the LHWCA or through the state workers' compensation system. The precedents consider four categories of maritime activities in three overlapping jurisdictional spheres relative to maritime and local regulation.

In *Sun Ship* the Supreme Court held that the 1972 amendments were intended to "supplement, rather than supplant, state compensation law." As a result, the sphere of concurrent jurisdiction expanded so that states could apply their workers' compensation scheme to land-based injuries falling within the LHWCA. Thus, since *Davis v. Dept. of Labor & Industries* adopted a sphere of concurrent jurisdiction under the 'twilight zone' theory, the regime of concurrent jurisdiction has expanded while the area of exclusive jurisdiction under the LHWCA has contracted. In the wake of *Sun Ship*, exclusive jurisdiction under the LHWCA is available only with respect to injuries sustained on navigable waters by maritime employees whose employment is not "local" in nature, *i.e.*, for a worker who is injured upon navigable waters while performing a traditional maritime activity. *McElheney v. Workers' Compensation Appeal Board*, 908 A.2^d 960, 964 (Pa. Commw. Ct. 2006), *aff'd*, 596 Pa. 48, 940 A.2^d 351 (Pa. 2008); *McCoy*, 335 Ill. App. 3^d at 728-29; *Wells v. Industrial Comm'n*. However, concurrent jurisdiction under both the LHWCA and state workers' compensation statutes exists for maritime-but-local injuries occurring on navigable waters, "doubtful" cases that fall within the "twilight zone," and for land-based injuries that meet the situs and status tests set forth in the 1972 amendments to the LHWCA. See *McElheney*, 908 A.2^d at 964; *Wells*, 277 Ill. App. 3^d at 386-87; 9 A. Larson & L. Larson, WORKER'S COMPENSATION LAW § 145.07[4], at 145-125-26 (2007).

(a) Maritime activity, exclusive federal jurisdiction.

Where the activity occurs on navigable waters, clearly involves maritime commerce, and is a "traditional maritime activity", federal jurisdiction is exclusive. *Southern Pacific Co. v. Jensen; Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407 (1976). *Thibadaux v. Atlantic Richfield Co.*, 580 F.2^d

If the employment of an injured worker was determined to have no "direct relation" to the navigation or commerce, and the "application of local law [would] not materially affect" the uniformity of maritime law, then the employment would be characterized as "maritime but local," and the state could provide a compensation remedy.

Director, OWCP v. Perini North River Assoc., 1983 AMC 609, 619 (1983), quoting *Grant-Smith Porter Ship Co. v. Rhode*, 257 U.S. 469, 477 (1922). See *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2^d 935, 1990 AMC 2150 (3rd Cir. 1990).

841, 1979 AMC 1794 (5th Cir. 1978), held: “It [is] clear that an exclusive remedy provision in a state workmen’s compensation law cannot be applied when it will conflict with maritime policy and will undermine substantive rights afforded by federal maritime law.” See also *Wellsville Term. Co. v. Workmen's Compensation Appeal Board*, 632 A.2^d 1305, 534 Pa. 333 (1993).

(b) Historical “maritime but local” doctrine.

Prior to the “twilight zone” cases, the Supreme Court recognized that some cases, although maritime, are nevertheless “local”, and therefore the principles of national uniformity do not apply, and state law governed exclusively. See, e.g., *Western Fuel Co. v. Garcia*; *Grant-Smith-Porter Ship Co. v. Rohde*. The “maritime but local” cases provided no option to the plaintiffs: their only cause of action was under state law, and they may have lost state causes of action by prosecuting at their risk what they believed to be their federal maritime remedies. The doctrine of “maritime but local” was abolished in *Davis v. Dept. of Labor & Industries*, which adopted the “twilight zone” doctrine which provided to basically non-maritime workers performing work on maritime localities an election as to their remedies.

(c) “Local activity”, exclusive state jurisdiction.

Non-maritime activities, although on navigable waters, such as land-based construction, construction of bridges, piers and other structures that are considered extensions of land, are not subject to maritime jurisdiction and state law applies. *W.R. Grace & Co. v. Dept. of Labor & Industries*, 178 Wash. 4, 33 P.2^d 659 (1934).

(d) The modern “maritime but local” rule – “local concern”.

Where the matter is a “local incident” (e.g., there is no “direct relation” to navigation or commerce), not requiring national uniformity, state statutes *may* be applied in the absence of a conflict with federal law. See, e.g., *Millers’ Indem. Underwriters v. Braud*, 270 U.S. 59 (1926); *Grant-Smith Porter v. Rohde*; and *Western Fuel Co. v. Garcia*, which allowed application of state workers’ compensation legislation to a “maritime but local” activity. *Pacific Merchant Shipping Ass’n v. Aubry*, 918 F.2^d 1409, 1991 AMC 2797 (9th Cir. 1990), states the rule: “States may supplement federal admiralty law as applied to matters of local concern, so long as state law does not actually conflict with federal law or interfere with the uniform working of the maritime legal system.” See also *Thompson v. Shell Oil Co.*, 1988 AMC 485 (D. Or. 1985); *Sunny Point Packing Co. v. Faigh*, 63 F.2^d 921, 1933 AMC 600 (9th Cir. 1933). *Garrisey v. Westshore Marina Associates*, 2 Wn. App. 718, 469 P.2^d 590 (1970), applied the “local concern” doctrine to determine that state workers’ compensation laws may be applied to a marina construction project on navigable waters, ruling that the nature of the worker’s activities, *i.e.*, that they are not “maritime”, rather than the place where the accident occurs, determines application of the doctrine that local activities unconnected with commerce and navigation *may* be subject to local legislation. *Brockington v. Certified Electric Co.*, 903 F.2^d 1523, 1991 AMC 586 (11th Cir. 1990), states that there is no Constitutional requirement of “uniformity for the sake of uniformity” of law, and held that a state’s interests in having its workers’ compensation statute applied to a worker injured while a passenger on his employer’s crew vessel which was transporting him to an island worksite outweigh the

interest in national uniformity of applying general maritime law, in the context of that local activity.

Some jurisdictions apply a bright-line test of whether the worker was employed on navigable waters and was engaged in “traditional maritime employment.” If so, the LHWCA is their exclusive remedy.⁴ Other states in determining if the work is “maritime but local” focus on the relationship and contacts that the employer and employee have to the state in which the injury occurs. This appears to be an untenable tenet as, except for employers who have multiple employment sites, most shipbuilders and stevedoring contractors could be considered in the latter category.

Several recent cases have been anomalous on the issue whether state law can apply to workers who clearly are within LHWCA coverage. The boundaries of the “local concern” exception were extended by the Connecticut Supreme Court in *Coppola v. Logistec Connecticut, Inc.*, which found concurrent jurisdiction between the federal Longshore & Harbor Workers’ Compensation Act (the “LHWCA”), 33 U.S.C. §§ 901, and the state workers’ compensation act on the grounds that although the injury was to a longshoreman working aboard a vessel on state navigable waters, the “employer and employee are locally based”. In *Norfolk Shipbuilding & Drydock Corp. v. Duke*, 420 S.E.2d 528, 14 Va. App. 1027 (Va. App. 1992), the on-navigable-waters employment of a shipbuilder was held to be “maritime but local” because both the injured employee and the corporate employer were Virginia citizens, the work was performed in Virginia waters and resulted from a local employment contract, and the employer-employee relationship was a proper subject of state interest and control. See also *Beverly v. Action Marine Services, Inc.*, 433 So. 2d 139 (La. 1983); *Allsouth Stevedoring Co. v. Wilson*, 220 Ga. App. 205, 469 S.E.2d 348 (Ga. Ct. App. 1996).

I believe *Coppola*, *Duke* and *Beverly* are inconsistent with the rule of a majority of jurisdictions that hold that the LHWCA is the exclusive remedy for workers injured on navigable waters while performing traditional maritime functions. See, e.g., *Lee v. Astoria Generating Co.*, 13 N.Y. 3^d 382, 2010 AMC 206 (N.Y. App. 2009) (*cert. pending*) (state safety statutes and regulations are preempted with respect to injuries occurring on a barge on navigable waters, as 33 U.S.C. § 905(b) provides that an action in negligence may be brought against a vessel and that such remedy “shall be exclusive of all other remedies against the vessel except remedies available under this chapter”); *Wellsville*, 534 Pa. at 337, 632 A.2^d at 1307 (“maritime employees who are performing traditionally maritime functions and are injured over navigable waters, under *Jensen*, are constitutionally barred from recovering under any state workmen's compensation law”); *Indiana & Michigan Electric Co. v. Workers' Compensation Commissioner*, 403 S.E.2^d 416, 184 W. Va. 673 (W. Va. 1991); *McElheney* (discusses the rule of exclusive jurisdiction); *Talik v. Federal Marine Terminals, Inc.*, 885 N.E. 2^d 204, 2008 AMC 809 (Oh. 2008 (the 33 U.S.C. § 904 provision for exclusive remedies under the LHWCA supersedes application of state remedies for intentional torts of employers, including for LHWCA employees injured on shore); *Donjon Marine Co. Limitation Proceedings*, 2008 AMC 2045 (S.D. N.Y. 2008). *Uphold v. Illinois Workers' Comp. Comm'n*, 896 N.E.2d 828, 385 Ill. App. 3^d 567 (2008), appears to state the appropriate status of the rule:

The parameters of the “twilight zone” and the “maritime but local” doctrine are not well defined. Although they are related, they are separate theories of concurrent jurisdiction. ... The “twilight zone” applies to areas in which there are “doubtful and difficult factual questions.” *Davis*, 317 U.S. at 257; see

⁴ See, e.g., *Wellsville*, 534 Pa. at 337, 632 A.2^d at 1307: “maritime employees who are performing traditionally maritime functions and are injured over navigable waters, under *Jensen*, are constitutionally barred from recovering under any state workmen's compensation law”; *Indiana & Michigan Electric Co. v. Workers' Compensation Commissioner*, 403 S.E.2^d 416, 184 W. Va. 673 (W. Va. 1991).

also *Wells*, 277 Ill. App. 3^d at 383; *Garrisey v. Westshore Marina Associates*, 2 Wn. App. 718, 469 P.2d 590, 594 (1970). We have defined the bounds of the “twilight zone” by exclusion, stating that the doctrine “does not apply to employees who are engaged in traditional maritime employment and are injured over navigable waters.” *Wells*, 277 Ill. App. 3^d at 383. In contrast, it has been held that a claim falls within the “maritime but local” doctrine if the worker’s injury occurs upon the navigable waters of the United States, the injured worker’s employment has no direct connection to navigation or commerce, and the application of local law would not materially affect the uniformity of maritime law. See *Perini*, 459 U.S. at 306. In this case, we find that claimant’s employment does not fall within either the “twilight zone” doctrine or the “maritime but local” doctrine.

This claim does not fall within the “twilight zone” because this is not a “doubtful” case. ... As explained above, if an employee is injured on navigable waters while engaged in a traditional maritime activity, jurisdiction under the LHWCA is exclusive. This is such a case. At the time of his injury, claimant was engaged in ship repair upon the navigable waters of the United States. Ship repair is a traditional maritime activity. ... Thus, claimant does not fall within the “twilight zone.” See also *Flowers [v. Travelers Ins. Co., 258 F.2d 220, 222 (5th Cir. 1958)]* (noting, “[B]oth before and since the time of *Davis*, the doing of repair work on an existing vessel has been treated as so clearly maritime in nature that attempted application of State compensation laws would collide with that essential uniformity which was the very breath of *Jensen*”).

896 N.E.2^d 843-844.

(e) “Maritime but local” – “twilight zone”.

In cases in the “twilight zone” – when it cannot be ascertained that the case falls within either exclusive maritime jurisdiction or exclusive state jurisdiction – it may be the plaintiff’s election whether he pursues remedies under the applicable state workers’ compensation act, the federal Longshore and Harbor Workers’ Compensation Act. *Davis v. Dept. of Labor & Industries; Garrisey v. Westshore Marine Associates*, 2 Wn. App. 718, 469 P.2^d 590 (1970). *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, 1959 AMC 570 (*per curiam* 1959), held that, as to cases within the “twilight zone”, state-created tort remedies could be available to a worker potentially within coverage of the LHWCA. The new “twilight zone” was greatly enlarged in 1972 when Congress extended coverage of the LHWCA to land-based employment activities relative to shipbuilding, shipbreaking, and the loading, unloading and repairing of ships that occur on land areas adjoining navigable waters used by the employer in such activities. *Sun Ship, Inc. v. Pennsylvania*, in the context of maritime workers performing their duties *on shore*, ruled that federal jurisdiction extended to the new land-based employments now covered by the LHWCA was concurrent with state jurisdiction to legislate workers’ compensation schemes for the same shoreside employments. *Sun Ship* relaxed the election of remedies rule, which held that a “twilight zone” worker would be bound by his election if it was determined that he was entitled to the remedy he elected, see, *e.g., Davis* and *Garrisey*, and held that, in twilight zone cases, LHWCA and state remedies are complementary rather than exclusive, and a prior award under state law would be credited against a LHWCA award. See also, *Herb’s Welding, Inc. v. Gray*, 470 U.S. 414, 1985 AMC 1700 (1985). *Sun Ship* can be construed as recognizing the rule of *Southern Pacific Co. v. Jensen* that state compensation laws cannot constitutionally apply to injuries to maritime workers who are injured in the course of their duties *on or over navigable waters*, but that there is a zone of complementary jurisdiction with respect to ship-building, repairing, and longshore activities performed *on shore* within the extended jurisdiction of the LHWCA.

(f) Twilight Zone – application to Jones Act seamen.

Although cases have determined that there is concurrent state and federal maritime jurisdiction with respect to injuries suffered by miscellaneous harbor workers and construction workers working on or over navigable waters at the time of injury, it is not clear whether states ever properly have legislative jurisdiction to extend state worker's compensation remedies to Jones Act "seamen" engaged in "local voyages". Admiralty jurisdiction does not depend on whether a vessel is engaged in interstate or foreign commerce and is not limited to the transportation of goods and passengers in interstate or foreign commerce: tort jurisdiction is based on the situs of tort being on navigable waters and the activity having some nexus to traditional maritime activity. See, e.g., *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 676, 1982 AMC 2253 (1982); *London Guarantee & Accident Co., Ltd. v. Industrial Accident Commission of the State of California*, 279 U.S. 109, 1929 AMC 495 (1929). Thus there is federal admiralty jurisdiction and Jones Act application to persons meeting the tests of "seamen" even if the vessels to which they are assigned function solely on local voyage so long as they are on navigable waters). That rule notwithstanding, there are several cases in which Alaska courts have determined that there is concurrent state jurisdiction with respect to claims of "seamen" where their employment was on a local voyage. Alaska legislation makes the Alaska workers' compensation act applicable to processing workers on seafood processing vessels. A.S. 23.30.230(5) and AS 16.05.940(4), expressly include "processing workers on floating fish processing vessels who do not operate fishing gear or engage in activities related to navigation or operation of the vessel." As it appears clear that such workers would be considered "seamen" under the *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 112, 1991 AMC 913 (1991) broad definition of "doing the ship's work", if the vessel is "in navigation", it appears that such legislation may be unconstitutional. The Alaska Workers' Compensation Board ruled that although a processing worker who served on a floating processor which processed seafoods in state territorial waters was a "seaman", there was sufficient state interest to justify extension of the state workers' compensation statute to a claim for injuries, and that his activities were of such "local interest" that local law could be applied. *Santamaria v. Arctic Ent., Ltd.*, AWCB D & O Nos. 618961, 609069, 609033, 1987 WL 95439 (1987). *Cordova Fish & Cold Storage Co. v. Estes*, 370 P.2d 180 (Ak. 1962), held Alaska workers' compensation legislation to be applicable to a commercial crab fisherman who was moving crab pots aboard the vessel while it was moored to a pier. *Santamaria* appears to have ignored that the "local concern" rule is restricted to situations not involving a direct relationship to navigation or commerce or conflicts with a rule of federal maritime law. *Estes* clearly involved a vessel that was "in navigation", although it was moored at the time of the injury so there is a question whether the seaman's activities at the time of the accident involved "navigation or commerce". As both tests would apply to claims involving "seamen" serving on even local-voyage vessels, it appears that the *Santamaria* and *Estes* decisions are not supported by law.

Trident Seafoods Corp. v. Murray held that a processor employee on a seafood processing vessel which normally did its processing while at anchor in Alaska waters was a seaman and, because of that status, application of the Alaska workers' compensation act to his injuries was superseded by federal seamen's remedies. The claimant initially had received workers' compensation benefits under the Alaska statute and then pursued his seaman's remedies in federal court through trial, which resulted in a determination that he was a Jones Act seaman and an award of damages. He subsequently applied to the workers' compensation board for an adjustment of his claim and the state agency concluded it had jurisdiction over the claim, concurrent with federal jurisdiction to provide seamen's remedies, under the "maritime but local" exception. On appeal of the agency's decision, the superior court limited application of the "maritime but local" doctrine to nonseamen. Relying on *Miles* and *Yamaha* for the rule that the Jones Act establishes a uniform

system of tort law and the interests of national uniformity required that seamen's remedies be uniformly applied, the court stated:

Based on historical precedent, together with recent opinions from the United States Supreme Court and statutory construction, state workers' compensation statutes cannot apply to the injury of a Jones Act seaman when that injury occurs within the worker's scope of employment as a seaman. This is true, even if the vessel is engaged in local trade or, as in the present case, where the vessel is anchored at various locations offshore for the purpose of fish processing. ...

(g) Election of remedies in the “twilight zone”: *res judicata* and collateral estoppel.

The fact that a claimant may have received benefits under a state workers' compensation program does not, in itself, preclude assertion of Jones Act rights and prosecution of other seamen's remedies. *Calbeck v. Travelers Ins. Co.* The doctrine of election of remedies does not apply due to the claimant merely making claim or bringing suit for one remedy of the other, or even accepting benefits of one remedy or the other: the issue is whether there has been an adjudication of seaman's status and/or admiralty jurisdiction in a prior proceeding that brings into application the doctrines of *res judicata* or collateral estoppel. *Mooney v. City of New York*, 219 F.3^d 123, 2001 AMC 38 (2nd Cir. 2000), held that receipt by a worker who potentially was a “seaman” of state workers' compensation pursuant to a “formal award” was not necessarily a waiver of seamen's remedies. *Rohrbacker v. Jackson & Jackson, Inc.*, 1992 AMC 101 (E.D. La. 1991), followed the general rule and held that an injured worker who is unsure of his status may pursue mutually exclusive remedies under state compensation statutes and seamen's remedies without being subject to an “election of remedies” defense. *Sharp v. Johnson Brothers Corp.*, 973 F.2^d 423, 1995 AMC 912 [DRO] (5th Cir. 1992), found that a claimant made a binding “election of remedies” and his Jones Act and General Maritime Law action was barred where he accepted compensation benefits which were subsequently formally approved by an administrative law judge in a consent order. The doctrine of *res judicata* was applied in *Kalesnick v. Seacoast Ocean Services, Inc.*, 866 F. Supp. 36, 1995 AMC 961 (D. Me. 199), to determine that where a plaintiff had prosecuted a contested workers' compensation claim and had obtained approval of a settlement agreement for permanent disability under a state workers' compensation statute, the plaintiff could not subsequently claim status as a Jones Act seaman.

**Conflict Between Exclusive Remedy Provisions of
State Workers' Compensation Statutes and
General Maritime Law Actions Against Employers**

The issue of federal supersession of exclusivity provisions of state workers' compensation statutes with respect to shoreside employees injured while temporarily aboard vessels operated by their employers as invitees or passengers has been subject to conflicting decisions. *Brockington v. Certified Electric* held the transportation of a workman being transported by a small boat to an island construction site was a “local incident,” hence the exclusive remedy provision of the state workers' compensation statute barred recovery under the general maritime law where a land-based employee was injured while temporarily a guest or passenger on board a vessel operated by the employer. *Brockington*, interestingly, stated that although compensation for a death on navigable waters would be governed by the general maritime law remedy, compensation for an injury was subject to the exclusivity provisions of the state workers' compensation statute. *Brockington* may conflict with

Fifth and Ninth circuit precedents. In *Chan v. Society Expeditions, Inc.*, 39 F.3^d 1398, 1994 AMC 2642 (9th Cir. 1994), a shore-based employee was injured while a passenger on a cruise ship operated by his employer. He applied for and received workers' compensation benefits from the state of Washington and then brought a negligence claim against his employer under the general maritime law. The district court dismissed the claim because of the exclusive remedy provision in Washington's workers' compensation law. The Ninth Circuit reversed, holding that the plaintiff had "a federal maritime right to sue [his employer]." *Green v. Vermilion Corp.*, 144 F.3^d 332, 1998 AMC 2328 (5th Cir. 1998), involved claims for injuries of a plaintiff employed as a cook and watchman at a duck hunting camp, who suffered an injury when he slipped while unloading supplies from the small ferry that served the camp. He made claim under both the LHWCA and a general maritime law for negligence. Although he did not seek state workers' compensation benefits, the parties agreed that he fell squarely within the purview of that system, including its exclusive remedy provision. The district court found that the plaintiff was not covered by the LHWCA under the "camp" and "recreational operation" exclusion, 46 USC § 902(3)(B), and that the state workers' compensation statute barred the claim for general maritime negligence against the plaintiff's employer. The Fifth Circuit reversed the latter holding, ruling that the workers' compensation system could not bar the general maritime negligence claim, stating that an "action for negligence has long been a vestige of general maritime law, subjecting it to the ebbs and flows of state legislation would disrupt the essential features of admiralty law." This issue recently was discussed in *Morrow v. Marinemax*, 2010 U.S. Dist. LEXIS 83646 (D. N.J. 2010), which also held that state exclusivity states are preempted by maritime tort remedies.

OCSLA and State Law.

The Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.*, in essence treats fixed oil and gas exploration and production activities on the seabed or attached to the seabed of the Outer Continental Shelf platforms as federal enclaves, subject to upland state law so far as some purposes, but extends the LHWCA to employee injury and death claims. 43 U.S.C. § 1333(b). The OCSLA applies to "any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf." *Id.* The Outer Continental Shelf is deemed to be "all submerged lands lying seaward and outside of the area of lands beneath navigable waters", *e.g.*, "submerged lands lying outside the territorial jurisdiction of the states." § 1331(a). State jurisdiction over offshore lands generally extends three miles from the coast line, though in certain cases it may extend further. § 1301(a)(2). A split of authority between circuits exists on whether outer continental shelf workers who are injured while temporarily performing duties ashore are covered by the OCSLA and the LHWCA. *Mills v. Director, OWCP*, 877 F.2^d 356 (5th Cir. 1989), applied a situs-of-injury requirement for OCSLA claims, requiring that the injury actually occurred on an outer continental shelf platform or on the waters above the outer continental shelf. *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2^d 805 (3rd Cir. 1988), rejected the situs-of-injury test and held that a claimant need only satisfy a "but for" test in establishing that the injury occurred "as the result of operations on the outer continental shelf." *Valladolid v. Pac. Operations Offshore, LLP*, 604 F.3^d 1126 (9th Cir. 2010), adopted the *Curtis* test, of finding OCSLA coverage for injuries which occurred as a "result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural

resources, of the subsoil and seabed of the outer Continental Shelf”, irrespective that the actual injury occurred on land or in state waters.